

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SERGEYI BAZAR,
Defendant.

Case No.: 15-CR-499-BEN

ORDER

Before this Court are seven discovery motions filed by the Parties. The Court will address each motion in turn.

I. Defendant's Motion to Suppress Defendant's Confession

Defendant moves to suppress his confession, made beyond six hours after his arrest but before presentment, because he argues the Government unreasonably delayed in bringing him before a judge. (Doc. No. 32.)

A. Six Hour Safe Harbor

A confession made within six hours after arrest is not inadmissible solely because of delay in bringing such person before a judge. 18 U.S.C. § 3501(c). Where a confession is made outside of the six hour period, the confession may be admissible

1 where the trial judge finds the delay reasonable after considering “the means of
2 transportation and distance to be traveled to the nearest available magistrate judge[.]” *Id.*

3 According to Defendant, he was arrested on Tuesday, February 3, 2015, at 5:22
4 pm. He was driven to police headquarters in downtown San Diego, California at 6:00 pm
5 and placed in a holding cell. He was given *Miranda* warnings at 11:34 pm—six hours
6 and twelve minutes after he was arrested. He was interviewed for approximately one
7 hour and twenty minutes. He confessed sometime between 11:34 pm and 1:00 am.

8 The confession took place outside of the six hour safe harbor here because the
9 delay was not due to means of travel or distance to the magistrate judge. Thus, the Court
10 must determine whether the delay was “unreasonable or unnecessary.” *Corley v. United*
11 *States*, 556 U.S. 303, 322 (2009).

12 B. Reasonable Delay

13 Under Federal Rule of Criminal Procedure 5(a), “[a] person making an arrest
14 within the United States must take the defendant without unnecessary delay before a
15 magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless
16 the statute provides otherwise.”

17 The *McNabb-Mallory* rule generally renders inadmissible any confession made
18 during detention that violates the defendant’s right to prompt presentment provided in
19 Rule 5(a). *Corley*, 556 U.S. at 308. If “the confession occurred before presentment and
20 beyond six hours, . . . the court must decide whether delaying that long was unreasonable
21 or unnecessary under the *McNabb-Mallory* cases, and if it was, the confession is to be
22 suppressed.” *Id.*

23 There are three categories of reasonable delays apart from transportation, distance,
24 and availability of a magistrate judge: (1) delays for humanitarian reasons; (2) delays due
25 to the unavailability of government personnel and judges necessary to completing the
26 arraignment process; and (3) delays necessary to determine whether the suspect should be
27 criminally charged. *United States v. Valenzuela-Espinoza*, 697 F.3d 742, 752 (9th Cir.
28 2011). Courts should be “careful not to overextend *McNabb-Mallory*’s prophylactic rule

1 in cases where there [is] a reasonable delay unrelated to any prolonged interrogation of
2 the arrestee.” *United States v. Garcia-Hernandez*, 569 F.3d 1100, 1106 (9th Cir. 2009)
3 (holding the delay due to shortage of personnel necessary to process defendant and
4 determine whether he should be charged was reasonable).

5 In *McNabb v. United States*, 318 U.S. 332 (1943), two defendants were arrested in
6 the middle of the night and were questioned for two days before they were brought before
7 a judge and before formal charges were brought against them. A third defendant was
8 detained and questioned continuously for nearly six hours. It was only the incriminating
9 statements made during this prolonged questioning that supported a charge and
10 conviction against them. The *McNabb* court held that the police detention of the
11 defendants beyond the time that a judge was readily accessible constituted “willful
12 disobedience of law.”

13 In *Mallory v. United States*, 354 U.S. 449 (1957), the court suppressed a
14 confession made seven hours after arrest where the police questioned the suspect for
15 hours, all the while they were nearby many judges and could have presented the
16 defendant.

17 After considering the *McNabb-Mallory* line of cases, this is not the type of case
18 that the *McNabb-Mallory* rule was designed for. Here, there is little-to-no connection
19 between Defendant’s voluntary statement and the delay in presentment. Defendant was
20 arrested at 5:22 pm on Tuesday, February 3; the six hour period from the time of his
21 arrest ended at 11:22 pm; police began interviewing Defendant at 11:34 pm; and
22 Defendant confessed sometime between 11:34 pm and 1:00 am. According to the
23 Government, Defendant was then scheduled for the first available booking window at
24 MCC, which turned out to be Wednesday, February 4 at 5:30 pm (approximately sixteen
25 hours after his interview ended). Because the federal magistrate judge on duty that week
26 held arraignment hearings at 2:00 pm, Defendant was brought before the magistrate judge
27 at the earliest time possible after booking, specifically Thursday, February 5 at 2:00 pm.
28

1 There is no evidence that a federal magistrate judge or a state or local judge was
2 available for Defendant's initial appearance between the time of Defendant's arrest and
3 his confession. And, there is no indication that interrogation continued during the
4 additional sixteen hours that he waited to be booked at MCC. Defendant contends he
5 could have been brought before the federal magistrate judge one day sooner, *i.e.*, on
6 Wednesday at 2:00 pm. But that would have made no difference. The confession was
7 obtained prior to the normally scheduled 2:00 pm time for arraignments. Defendant's
8 confession was not obtained after an unreasonable delay. The confession was not a
9 product of the delay. The delay in presentment was caused by the unavailability of an
10 earlier booking window at MCC, rather than any intentional delay by the arresting agents.

11 The delay in presentment therefore was caused by the unavailability of other
12 governmental personnel who were necessary for completing the arraignment process, and
13 was completely unrelated to Defendant's interrogation. As such, the delay was not
14 unreasonable nor unnecessary. The confession is admissible. Accordingly, the Court
15 **DENIES** the Motion to suppress the confession.

16 **II. Defendant's Motion to Suppress Laptop**

17 Defendant also moves to suppress evidence from a laptop computer found in
18 Victim 2's hotel room, arguing that it was illegally seized. (Doc. No. 32.)

19 Under the plain-view doctrine, an officer may lawfully seize evidence without a
20 warrant if the officer lawfully arrived at the place where the evidence could be plainly
21 viewed, and the incriminating character of the evidence was immediately apparent.
22 *Horton v. California*, 496 U.S. 128, 135-36 (1990).

23 According to the Government's Opposition, on December 16, 2014, Detective
24 McGilvray, posing as a client interested in a massage, was invited into a hotel room by
25 Victim 2. When Victim 2 agreed to perform sexual acts for money, Det. McGilvray
26 placed her under arrest. During the arrest, the laptop computer was sitting on the desk
27 beside the hotel bed, and visible to anyone in the room. Victim 2 said she had permission
28

1 to use it to play music for customers and informed agents that the laptop was used to post
2 her backpage.com massage ads on the internet. The agents then seized the laptop.

3 Here, the detective was lawfully in the hotel room and the laptop was in plain
4 view. At that time, Victim 2 identified the laptop as one used to commit crimes. The
5 incriminating character of the laptop was then readily apparent, and the detective could
6 lawfully seize it. The Court therefore **DENIES** the Motion to suppress evidence from the
7 laptop.

8 **III. Defendant's Motion to Suppress Prior Identifications**

9 Defendant also asks this Court to suppress the identifications made by Victims 1
10 and 2 because Defendant contends the identifications were the results of an impermissible
11 suggestion. (Doc. No. 32.)

12 A prior out of court identification should be suppressed only where, after
13 considering the totality of the circumstances, "the photographic identification procedure
14 was so impermissibly suggestive as to give rise to a very substantial likelihood of
15 irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 385 (1968).
16 "[T]he factors to be considered in evaluating the likelihood of misidentification include
17 the opportunity of the witness to view the criminal at the time of the crime, the witness'
18 degree of attention, the accuracy of the witness' prior description of the criminal, the
19 level of certainty demonstrated by the witness at the confrontation, and the length of time
20 between the crime and the confrontation." *Neil v. Biggers*, 409 U.S. 188, 200 (1972)
21 (holding there was no substantial likelihood of misidentification where police arranged
22 for a show-up, brought the defendant to the victim, and required him to say "shut up or
23 I'll kill you" seven months after the date of the crime).

24 Here, according to the Government's Opposition, on November 30, 2014, police
25 responded to a call from Victim 1 who reported that she had been held against her will at
26 the Days Inn for three days. Victim 1 explained that she responded to an employment
27 advertisement on a Russian social media website. Defendant discussed the specifics of
28 the "massage" position that he had available. Victim 1 agreed to take the position and

1 booked a one-way flight from Miami to San Diego. Defendant apparently picked Victim
2 1 up from the airport and told her that she would have to have sex with customers.
3 Defendant advertised Victim 1's services on backpage.com and demanded that Victim 1
4 pay Defendant \$400 per day. Defendant said he was always watching Victim 1, and
5 when Victim 1 told him she wanted to leave, Defendant became aggressive and shoved
6 her head into a mirror. Defendant took Victim 1's cell phone and money. When she ran
7 to the lobby, the motel clerk called the police. When police arrived, they showed Victim
8 1 a photograph of Defendant and asked if the man in the picture was the man who she
9 was talking about. She said yes.

10 On December 10, 2014, Detective McGilvray saw a new posting on backpage.com
11 with the same contact phone number as used in Victim 1's backpage.com ads. He then
12 posed as a client seeking a massage and scheduled an appointment. The detective went to
13 the Western Inn for the "appointment" and was invited into a hotel room by Victim 2.
14 She offered to perform sexual acts in exchange for money. She was then arrested.
15 Victim 2's story was similar to that of Victim 1. She said she responded to an
16 employment ad on the same Russian social media website as did Victim 1. Victim 2 was
17 contacted by Defendant, whom she met in person to discuss the position. Victim 2 then
18 agreed to take the position, and was told she must pay Defendant \$400 per day. When
19 she could not pay, Defendant forced her to have sex with him. After her arrest, Victim 2
20 was shown a picture of Defendant and she identified him.

21 Although showing each victim a single photograph was suggestive, it was not
22 impermissible. *But see Simmons*, 390 U.S. at 384 (noting that the potential for a
23 misidentification increases where police show the witness a photograph of a single
24 individual who fits the general description of the person the witness described). Victim 1
25 and Victim 2 had ample opportunity to familiarize themselves with Defendant's
26 appearance. Victim 1 was held in a hotel room with Defendant for three days. Victim 2
27 met with Defendant to discuss the "position" before being put up in a hotel room. Victim
28 2 also acted intimately with Defendant. There is no evidence that either of the victim-

1 witnesses were incapacitated in any way during their interactions with Defendant. In
2 addition, Victim 1 identified Defendant the same day that she saw him. Although the
3 record does not provide how certain the victims were when they identified the Defendant
4 or how they described Defendant before they were shown the photograph, such
5 information does not undermine the reliability of the photo identifications made here.

6 From the information before the Court, it is apparent that the victims would not
7 have been easily persuaded or misguided by the showing of a single photograph. The
8 Court therefore **DENIES** the Motion to suppress prior identifications.

9 **IV. Defendant's Motion for Supplemental Discovery**

10 Defendant asks that the Government produce the entire A-files of Victims 1, 2, and
11 3, so that Defendant can inspect them. (Doc. No. 28.) Defendant contends that the A-
12 files are material to presenting his defense, because they will tend to show that the
13 victims have substantial motive to lie, *i.e.* to accuse Defendant of these crimes in order to
14 secure a visa allowing the victims to remain in the United States.

15 Federal Rule of Criminal Procedure 16(a)(1)(E) requires the Government to
16 produce to the defendant any item that is material to preparing his defense. Under *Giglio*
17 *v. United States*, 405 U.S. 150, 154 (1972), where a witness' credibility is critical to the
18 case, the Government must produce anything that might negate the witness' credibility.

19 Here, it is alleged that the victims remained in the United States illegally by
20 overstaying student or work visas. In addition, the victims were found engaging in
21 prostitution. If any of this information is true, the victims are likely deportable.
22 However, if they assist in the prosecution of Defendant, the victims might be eligible for
23 a U-visa or S-visa. Their testimonies against Defendant are certainly important. Further,
24 their credibility will likely play a significant role in the case.

25 Defendant is entitled to any impeachment evidence that might be found in the
26 witnesses' A-files, but it is not necessary to compel the Government to produce the entire
27 A-files. See *United States v. Caza*, Crim. No. S-06-0058, 2009 WL 465619, at *1-2
28 (E.D. Cal. Feb. 24, 2009) (government met its obligation under *Brady* and *Giglio* after

1 producing approximately 30 out of hundreds of pages from a witness' A-file). The
 2 Government agrees that it must provide impeachment evidence, and offers to review the
 3 A-files and produce such evidence to Defendant.

4 The Court therefore **GRANTS in part** Defendant's Motion to compel production
 5 of the A-files. The Government is **ORDERED** to review the A-files and produce to
 6 Defendant any impeachment evidence within **14 days** of the date this Order is filed.

7 **V. Defendant's Motion to Compel Discovery**

8 As of March 2015, Defendant received two discs from the Government, which
 9 included several hundred pages of discovery. Defendant, however, believes he has not
 10 received all discovery, and moves to compel the Government to produce all available
 11 discovery. (Doc. No. 20.) The Government did not file an Opposition.

12 Due to the more recent and more specific motions, it appears Government has
 13 produced all available discovery except the requested A-files. Accordingly, Defendant's
 14 Motion to Compel is **DENIED as moot**.

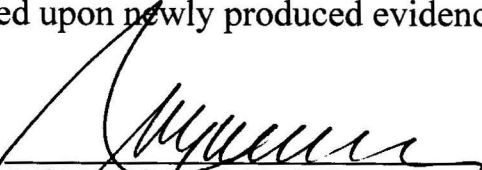
15 **VI. Government's Motion for Reciprocal Discovery (Doc. No. 19)**

16 The Government filed this motion seeking to compel Defendant to produce any
 17 relevant information pursuant to Federal Rule of Criminal Procedure 16(b). Defendant
 18 did not file an Opposition. As specific discovery motions were subsequently filed, it
 19 appears the Government does not seek anything from Defendant that it does not already
 20 have. The Court therefore **DENIES** the Motion **as moot**.

21 **VII. Defendant's Motion for Leave to File Further Motions (Doc. Nos. 32, 28)**

22 Defendant asks for leave to file further motions if needed. (Doc. Nos. 32, 28.) The
 23 Government does not oppose. The Court **GRANTS** Defendant leave to file further
 24 motions, so long as the new motions are based upon newly produced evidence.

25
 26 Dated: July/7, 2015


 27 HON. ROGER T. BENITEZ
 28 United States District Judge